

Protest of )  
 ) Date: February 14, 1990  
GEORGIA POWER COMPANY )  
 ) P.S. Protest No. 90-01  
Electric Utility Services -  
Athens, GA

### DECISION

Georgia Power Company ("Georgia Power") timely protests an award for electrical services to Jackson Electric Membership Corporation ("Jackson EMC") at the new General Mail Facility at Athens, GA.<sup>1/</sup> Award was made to Jackson EMC on December 7, 1989.

In its protest, Georgia Power contends that the award to Jackson EMC is contrary to substantive postal regulations because it violates the Georgia Territorial Electric Service Act of 1973. Official Code of Georgia Annotated ("O.G.C.A.") " 46-3 et. seq. (Michie 1982). Georgia Power states that the Procurement Manual ("PM") requires the contracting officer to adhere to state regulations in contracting for utility services. PM 8.5.2.b 3<sup>1/2</sup> It claims that the Athens postal facility is located within the territory assigned to Georgia Power by the Georgia Public Service Commission and that Georgia Power thus has the exclusive right, subject to certain exceptions, to provide electrical services to the Athens facility. An exception to the state law would allow Jackson EMC to supply electrical services under the contract if the Athens facility qualifies as a large load customer, i.e. one with a "connected load which, at the time of initial full operation of the premises, is 900 kilowatts or greater (excluding redundant equipment). . ." O.G.C.A. ' 46-3-8(a).

Georgia Power alleges that the 988 kilowatt ("kw") connected load estimate in Jackson EMC's proposal is inflated and that the initial connected load of the Athens facility will be less than 650kw. This would eliminate the facility as a large load customer under the exception. Georgia Power complains that although the contracting officer provided

<sup>1/</sup>There is no solicitation number in this procurement, as the services were obtained under the section of the Procurement Manual ("PM") which provides for the procurement of utility services as a special category of contract. PM 8.5.2 (c).

<sup>2/</sup>PM 8.5.2 b.3 states that "[w]hen a Federal, State, or local governmental agency has issued regulations or established procedures affecting cost allowability, pricing, rates, and other matters, it is Postal Service policy, as a matter of comity rather than law, to comply with those regulations or procedures, subject to judicial appeal."

identical equipment lists both to it and Jackson EMC to use in calculating the connected load of the Athens facility, a technical conference should have been held pursuant to PM 4.1.5 f.2,<sup>3/</sup> to resolve the allegedly inflated estimates of the expected load and energy profile. Georgia Power concludes that since Jackson EMC has no legal right under state law to provide electrical services to the Athens facility, it is not a responsible contractor under PM 3.3.1 b.7<sup>4/</sup> and contends that any revocation of the Postal Service's policy of comity is unfair, arbitrary and capricious.

In addition, Georgia Power maintains that award to Jackson EMC is not in the best interests of the Postal Service because the Georgia Public Service Commission does not have jurisdiction over Jackson EMC's rates, while Georgia Power's rates are fully regulated. Thus, it suggests that any perceived economic benefit derived from contracting with Jackson EMC is speculative. In this regard, Georgia Power also mentions its history of satisfactory service to the Postal Service under other contracts and again contests the contracting officer's determination that Jackson EMC is a responsible offeror. Georgia Power requests that the award to Jackson EMC be revoked and award be made to it.

In his report, the contracting officer states that, having determined that the Postal Service should comply with the Georgia state law as a matter of policy, although not of law, a pre-award issue was whether the Postal Service had a choice of suppliers for electrical services in this instance. In order to make this determination, the contracting officer required each offeror to include in its proposal a connected load estimate, established in part by analyzing a list of equipment to be used in the Athens facility. On September 28, both Georgia Power and Jackson EMC submitted proposals, but each company's connected load figure appeared to be based on a different equipment list. Consequently, on October 30, the Postal Service, Georgia Power, and Jackson EMC attended a meeting to resolve the inconsistencies. Although a subsequent meeting was contemplated, after supplying each offeror with an identical equipment list on November 28, and requesting final proposals based on that list, the contracting officer decided that another meeting was unnecessary. The connected load estimate submitted by Georgia Power in its final offer was 631kw; that of Jackson EMC, 998kw.

Due to the considerable discrepancy in the submitted estimates, before making his decision, the contracting officer considered additional information from Postal Service technical personnel and an outside consultant. The manager of the Engineering Technical Unit in Atlanta suggested that the accuracy of the estimates was unclear and recommended that award be made to the company that would serve the best interests of the Postal Service. A postal employee from the Maintenance Engineering Support Office stated that from a sample it analyzed, the kw estimates submitted by Jackson EMC were more accurate than those submitted by Georgia Power. A Maintenance

<sup>3/</sup>Although the protester cites PM 4.1.5 f.22, it apparently is referring to PM 4.1.5 f.2, which requires discussions "[w]hen there is uncertainty as to the pricing or technical aspects of the most favorable initial proposal . . . unless the uncertainty can be resolved by clarification."

<sup>4/</sup>PM 3.3.1 b.7 states that in order to be determined responsible, a prospective contractor must "[b]e otherwise qualified and eligible to receive an award under applicable laws and regulations."

Program Specialist compared five pieces of equipment listed by both companies and concluded that Jackson EMC's figures were closer to the kilowatt values he had calculated for those pieces of equipment. Finally, an outside consultant calculated a total connected load of 1,119 kva.<sup>17</sup> Based on this information and on the fact that both proposals were based on consistent equipment lists, the contracting officer concluded that the Postal Service had a choice of electrical service providers. The contracting officer maintains that Georgia Power's allegation that Jackson EMC is not eligible to provide the service is based upon a dispute between the two offerors which should be resolved by the Georgia Public Service Commission. He contends that his actions, rather than being arbitrary and capricious, were rational and procedurally correct.

The contracting officer refutes Georgia Power's contention that the award is not in the best interest of the Postal Service, stating that his selection of Jackson EMC was based not only on the fact that it proposed the lowest average kw cost, but also because it offered a margin refund, had a history of fewer rate increases, and presented a more credible connected load figure.

In its comments on the contracting officer's report, Georgia Power reiterates that award to Jackson EMC was improper absent a second technical conference to determine the qualification of the Athens facility under the 900kw exception. Georgia Power alleges that in the past, this issue often has been resolved after a meeting between affected suppliers to review the customer's building plans. It contends that such a conference is especially important here, where the Postal Service made no independent determination of the connected load of its facility.

Georgia Power enumerates three alleged flaws in the estimate submitted by Jackson EMC: 1) it contains connected load figures that conflict with the building plans, such as those for hand dryers not mentioned in the plans,<sup>18</sup> the lighting load figure, and the estimate for two chillers; 2) it contains improbable electric loads, such as those for personal computers ("PCs") and printers; and 3) it contains load figures that do not qualify for inclusion under the 900kw exception, such as those for spare motors and future load<sup>19</sup> as contrary to the statutory prohibition of "redundant equipment" and the requirement that the estimate be for the connected load at "initial full operation." It asserts that only through intense utilization of receptacle capacity could the estimate approach 900kw and concludes that a finding that Jackson EMC's connected load figure is more credible than Georgia Power's is unreasonable.

Jackson EMC submitted comments on the contracting officer's report. Jackson EMC

<sup>17</sup>The kva figure represents the "design load," rather than the connected load, and must be converted to kw in order to calculate a connected load.

<sup>18</sup>Georgia Power does not explain why this is improper. Hand dryers were on the equipment list supplied to both parties and Georgia Power's proposal also contained a connected load figure for hand dryers.

<sup>19</sup>Jackson EMC's proposal did not contain a connected load figure for the item on the equipment list entitled "misc. motors," it did contain a figure for "future load." Georgia Power's proposal did contain a connected load figure for "misc. motors," but not for "future load."

states that the contracting officer, after careful consideration of all available information, made the correct decision to award to Jackson EMC and refutes Georgia Power's contention that its connected load estimate was purposely inflated in order to place itself under the 900kw exception. Jackson EMC submits that it is Georgia Power, not Jackson EMC, that has manipulated the connected load estimate. It also suggests that it is not the Postal Service's burden to decide whether Georgia law permits Jackson EMC to provide services in this case and that Georgia Power has recourse to the Georgia Public Service Commission if it disagrees with Jackson EMC's connected load estimate.

Jackson EMC also disagrees that award to it is not in the best interests of the Postal Service due to its unregulated rates, noting that its rates historically have been lower than Georgia Power's and that Georgia Power has offered no reason why this trend should not continue. Finally, it states that the allegation that it is not a responsible offeror is ridiculous, as it is one of the ten largest electric membership cooperatives in the United States and has provided reliable electrical services for over fifty years.

Jackson EMC submitted supplemental comments on the specific technical points raised by Georgia Power in its response to the contracting officer's report. As to its alleged departure from the original construction drawings and plans, Jackson EMC submits that both it and Georgia Power relied on the equipment list prepared by the Postal Service after construction was well underway, and that Georgia Power cannot now complain that the list departs from the original plans. It contends that its estimate for lighting includes both outdoor and indoor lighting, a fact overlooked by Georgia Power, and, therefore, complies with the building plans. It maintains that its methodology for arriving at the estimates for the equipment listed, including the chillers, is correct. It asserts that the connected load for computers is not overstated, but correctly includes the estimate for two Computerized Forwarding System ("CFS") machines having a higher connected load value, not just PCs and printers. Jackson EMC alleges that its estimate does not include receptacle loads at all, but only the loads for the equipment listed as that which will actually be plugged into the receptacles. Finally, Jackson EMC argues that the inclusion of an estimate for future load was not improper, because the equipment and their connected loads are described in detail in the November 7 memorandum from the Athens postmaster. Jackson EMC reiterates that the disagreement between it and Georgia Power should be resolved by the Georgia Public Service Commission, not this office.

All the parties agree that the primary issue in Georgia Power's protest is whether, under Georgia law, Jackson EMC qualifies to provide electric services to the Athens facility. To the extent that Georgia Power places the onus of determining the connected load estimate of the Athens facility on this office, it is outside our bid protest jurisdiction. "It is the primary responsibility of the duly constituted state authorities, rather than the Postal Service to police compliance with state laws and regulations enacted for the governance of regulated public utilities." Omni Communications, Inc., P.S. Protest No. 83-03, April 18, 1983. Furthermore, contrary to Georgia Power's contention that PM 8.5.2 b requires the contracting officer to adhere to state law, we note that the PM does not mandate any action on the part of the contracting officer, but merely relates the policy of the Postal Service. In any event, here, it is the responsibility of the contractor, not the contracting officer, to comply with state law.

Pikes Peak Water Company, Comp. Gen. Dec. B-211984, 84-1 CPD & 315, March 16, 1984 ("while the successful offeror must comply with [state law], whether and how it does so is not for determination by the contracting officer or, for that matter, by our Office."); see also Goodhew Ambulance Service, Inc., Comp. Gen. Dec. B-209488.2, 83-1 CPD & 487, May 9, 1983.<sup>17</sup> If Georgia Power wishes to pursue this issue further, it may do so before the Georgia Public Service Commission, which is the duly authorized state body with the jurisdiction and expertise to review and rule on such concerns.<sup>18</sup> We will not decide this factual matter which depends entirely on state law, and to the extent that it asks us to do so, we dismiss Georgia Power's protest as outside our protest jurisdiction.

With respect to Georgia Power's allegations that Jackson EMC is not a responsible offeror, it is well settled that:

An affirmative determination of responsibility is a matter within the broad discretion of the contracting officer and is not subject to being overturned by this office in the course of a protest absent fraud, abuse of discretion, or failure to apply definitive responsibility criteria.

Knoxville Glove Company, P.S. Protest No. 88-75, November 15, 1988, quoting Gage Constructors, P.S. Protest No. 87-11, July 13, 1987; see also, Triad Building Maintenance Co., P.S. Protest No. 88-11, February 17, 1988; Logan Co., P.S. Protest No. 83-1, February 9, 1983. Georgia Power does not allege any fraudulent behavior on the part of the contracting officer and we do not find that the contracting officer abused his discretion. Georgia Power's only basis for alleging that Jackson EMC is not a responsible offeror again relates to the state law issue. The failure of a successful offeror to comply with state law "does not affect the legality of the contract award." Blue Cross and Blue Shield of Virginia, *supra*. Here, the contracting officer made every effort to determine whether it could solicit this procurement competitively and based his decision on the best information available. Georgia Power has not presented any evidence which would lead this office to overturn the contracting officer's determination.

Finally, apart from the state law issue, Georgia Power contends that award to Jackson

<sup>17</sup>The reasoning behind these decisions is that government contracting officers, as a rule, do not have the expertise required to judge whether a contractor is in compliance with state laws and regulations. See Blue Cross and Blue Shield of Virginia, Comp. Gen. Dec. B-222485, 86-2 CPD & 61, July 11, 1986. The wisdom of that reasoning is apparent here, where both parties have submitted conflicting technical factual conclusions regarding connected load estimates that neither the contracting officer nor this office are competent to resolve.

<sup>18</sup>That Georgia Power is aware of the avenue open to it before the Public Service Commission is demonstrated by a decision of that body which Georgia Power submitted to the contracting officer in support of its position. Troup Electric Membership Corp. v. Georgia Power Co., Georgia Public Service Commission Docket No. 3827-U, January 25, 1989. There, in a case which the hearing officer described as "a matter of first impression in this state," the Commission construed the meaning of the term "connected load" and ordered Georgia Power to cease providing service it was not entitled to provide under the Act.

EMC is not in the best interest of the Postal Service because its rates are unregulated and any perceived benefit is speculative. The choice as to what is in the best interest of the Postal Service is a business decision within the discretion of the contracting officer and will not be overturned unless the contracting officer has clearly abused his discretion. See generally AHJ Transportation, Inc., P.S. Protest No. 89-05, May 3, 1989; Southwest Bell Telephone, Inc., P.S. Protest No. 89-23, April 19, 1989. As we have stated, nothing in the record indicates that the contracting officer abused his discretion.

This protest is dismissed in part and denied in part.

William J. Jones  
Associate General Counsel  
Office of Contracts and Property Law

**[checked against original JLS 5/26/93]**